No. 89-1322

In The

Supreme Court of the United States

October Term, 1990

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICI CURIAE OF THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, THE ALABAMA-COUSHATTA INDIAN TRIBE OF TEXAS, THE UNITED INDIAN NATIONS OF OKLAHOMA, (additional amici listed inside) IN SUPPORT OF RESPONDENT

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Fort Belknap Indian Community;
Fort Mojave Indian Tribe of Arizona, California and Nevada;
Menominee Indian Tribe of Wisconsin;
Miccosukee Tribe of Indians of Florida;
Mille Lacs Band of Chippewa Indians;
Native Village of Tyonek;
Oglala Sioux Tribe of the Pine Ridge Reservation;
Poarch Band of Creek Indians;
St. Regis Band of Mohawk Indians of New York;
Seminole Tribe of Florida;
Sisseton-Wahpeton Sioux Tribe;
Three Affiliated Tribes of the Fort Berthold Reservation;
Walker River Paiute Tribe;
Association on American Indian Affairs

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INTEREST OF THE AMICI CURIAE

Amici curiae are seventeen (17) federally-recognized Indian tribes, one regional tribal organization, and one national Indian-interest organization.[1] Ami have a substantial interest in the issues raised in this case. The issues involve the scope of the doctrine of tribal sovereign immunity from suit as that doctrine is expressed in federal law, and the geographic territory over which that doctrine and other principles of federal Indian law apply.

The United Indian Nations of Oklahoma was formed in the 1980's to help support and advance Indian tribes on issues of concern to the health and welfare of Indian people in the region of the State of Oklahoma. Its membership consists of twenty-nine (29) federally-recognized Indian tribes.[2] The Association on American Indian Affairs is a non-profit organization dedicated to protecting the rights and improving the welfare of American Indian and Alaska Native communities nationwide. It

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[1] Counsel for Petitioners and counsel for Respondents have consented to the filing of the brief of amici in support of Respondents. The consents are submitted for filing herewith.

[2] They are, the Absentee-Shawnee Tribe; Alabama-Coushatta Tribe of Texas; the Apache Tribe; the Caddo Tribe; the Cheyenne-Arapaho Tribe; the Cherokee Nation; the Chickasaw Nation; the Choctaw Nation; the Comanche Tribe; the Muscogee (Creek) Nation; the Eastern Delaware Tribe; the Fort Sill Apache Tribe; the Iowa Tribe of Oklahoma; the Kaw Tribe; the Kickapoo Tribe of Kansas; the Kickapoo Tribe of Oklahoma; the Kickapoo Tribe of Texas; the Kiowa Tribe; the Otoe-Missouria Tribe; the Pawnee Tribe; the Ponca Tribe; the Sac and Fox Tribe; the Seminole Nation; the Seneca-Cayuga Tribe; the Thlopthlocco Creek Tribe; the Tonkawa Tribe; the Western Delaware Tribe; the Wichita Tribe; and the Wyandotte Tribe.

was founded in 1922 and is the largest Indian-interest organization in the country, with a membership of about 14,400 individuals, Indian and non-Indian.

Amici urge this Court to affirm its prior holdings that the sovereignty of Indian tribes includes the right to be immune from suit without their consent or the consent of Congress, and that such sovereignty is properly exercised within the bounds of tribal trust lands such as are involved here. Amici tribes currently exercise their sovereign authority over their trust lands and other Indian country within their jurisdiction. They do so under this Court's prior holdings and under other federal law confirming their sovereignty and sovereign immunity.

Immunity from suit is especially important to amici in cases such as this, which pose a grave danger to tribal public treasuries. Indeed, a fundamental purpose of the doctrine of sovereign immunity is to protect against raids on public treasuries. Diminishment of their treasuries would hinder the ability of tribes to provide essential governmental services and engage in economic development, and thereby undermine the congressional goal of tribal self-government and economic self-sufficiency. Thus, tribal achievement of this congressionally expressed goal hinges on continued protection of their sovereignty by this Court.

SUMMARY OF ARGUMENT

Absent consent, a state cannot sue an Indian tribe to recover back taxes, penalties, and interest. Federal law confirms the sovereign immunity of tribes from

unconsented suits. This Court has steadfastly held that in the absence of congressional consent it cannot abrogate that immunity and the State here points to no evidence of congressional consent to its suit. The Court's continued protection of tribal sovereign immunity is particularly warranted where a raid on a tribal treasury is threatened, such as here. Such raids on public treasuries are contrary to general principles of sovereign immunity in American jurisprudence and would clearly frustrate important federal interests in assisting Indian tribes in achieving governmental and economic self-sufficiency.

Remedies exist by which the State may enforce its applicable tax laws prospectively, such as seizing unstamped cigarettes off the reservation, or assessing the wholesaler rather than the tribal retailer. The State here chose not to fully pursue these remedies. Instead, after allowing its taxes to go uncollected over a period of many years, and without pointing to any law or compelling reason, it asks this Court to overturn scores of precedent and facilitate raids on tribal treasuries by generally abrogating tribal sovereign immunity. This Court should decline that invitation and refer the State to Congress, the branch of the federal government properly charged with consenting to suits against sovereign Indian tribes.

The State also seeks to avoid the application of the federal doctrine of tribal sovereign immunity and other principles of Indian law by arguing that the reservation boundaries in this case have been disestablished; that the tribal land involved here is not subject to tribal jurisdiction; and that Indian tribes in Oklahoma and their lands are somehow different and therefore exempt from the normal rules of Indian law.

These arguments are meritless in light of established legal principles. Cases of this Court firmly establish that questions of boundary disestablishment are irrelevant to issues of jurisdiction over trust land such as are involved in this case. Other cases and congressional enactments confirm that land validly set aside for tribal use and subject to federal protection is subject to tribal jurisdiction; which is precisely the status of the land here. Finally, this Court and Congress have consistently treated Indian tribes in Oklahoma the same as tribes elsewhere, and the Court should continue to do so in this case.

ARGUMENT

I. THE STATE IS BARRED BY FEDERAL LAW AND POLICY FROM SUING THE TRIBE FOR BACK TAXES OWED BY NON-MEMBER TAXPAYERS, PLUS INTEREST AND PENALTIES.

In Part I of this brief, amici will address the issue of whether the Oklahoma Tax Commission ("the State") may raid the public treasury of the Citizen Band Potawatomi Indian Tribe of Oklahoma ("the Tribe") to collect back taxes, penalties, and interest, and will show why federal law and policy prohibit that action. Amici will also address the issue of the State's existing remedies regarding applicable future taxes, and will show why those remedies are adequate and are all that this Court can provide as a matter of law.[3]

[3] Amici have chosen not to address the issue of whether the state taxes in this case are wholly invalid as applied to the Tribe's sales under the "legal incidence" test set forth by this

(Continued on following page)

A. Permitting The State To Sue The Tribe For Back Taxes, Penalties, And Interest Would Frustrate Federal Law And Policy Protecting Tribal Self-Government And Would Contradict Longstanding Principles Underlying The Federal Doctrine Of Tribal Sovereign Immunity.

In reliance on Moe, Colville, and Chemehuevi, the State has assessed the Tribe for almost $2.7 million dollars due to state taxes which the Tribe allegedly failed to collect over a period of almost four years.[4] The taxes, penalties, and interest that the State seeks must come directly from the Tribe's treasury. As an intrusion on core tribal interests in self-government and economic self-sufficiency, such assessment is impermissible under federal law.

(Continued from previous page)

Court in Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976) ("Moe"); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) ("Colville"); and California State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985) ("Chemehuevi").

The Court in these cases apparently holds that involuntary tribal assistance in collecting the state taxes does not violate federal law or interfere with tribal self-government. *E.g.*, Moe, 425 U.S. at 483. This is tantamount to a grant of authority to states to regulate Indian tribes, albeit subject to a "minimal burden" test. Amici respectfully submit that this result is erroneous, since directly subjecting tribes to state laws and in effect making them collection agents for the states does infringe on tribal self-government. We will not, however, address this issue in this brief.

[4] The taxes themselves are less than one third of the total amount the State seeks. Penalties, and interest, which of course accrues over time, make up the rest of the amount.

Notwithstanding the State's suggestions to the contrary, Indian tribes are sovereign governments.[5] Tribal sovereignty is recognized in and confirmed by federal law.

> The powers of Indian tribes are, in general, inherent powers of a limited sovereignty which has never been extinguished. . . . Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . They are a good deal more than private, voluntary organizations. The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.

United States v. Wheeler, 435 U.S. 313, 322-23 (1978) (citations omitted).

Sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986). Accordingly, as sovereign governments, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("*Martinez*"). This Court has recognized that Congress can waive tribal sovereign immunity, but the Court itself cannot judicially abrogate

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[5] The State suggests that Indian tribes in Oklahoma are somehow "different" than Indian tribes elsewhere. In Part II of this brief, amici will discuss how this Court and Congress historically have treated Oklahoma tribes the same as tribes elsewhere, and how that view continues to guide Congress.

it. "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian Nations are exempt from suit." *Martinez*, 436 U.S. at 58, *citing United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) and *Turner v. United States*, 248 U.S. 354 (1919).

Thus, the Court historically has refused to allow unconsented suits against Indian tribes. In *United States v. United States Fidelity & Guaranty Co.*, the Court disallowed a judgment obtained in state court against two tribes for royalties allegedly due under coal land leases.

> We are of the view, however, that the Missouri judgment is void in so far as it undertakes to fix a credit against the Indian Nations. . . . These Indian Nations are exempt from suit without congressional authorization.

United States v. United States Fidelity & Guaranty Co., 309 U.S. at 512. Finding no congressional authorization, the Court concluded that "without legislative action the doctrine of immunity should prevail." *Id.* at 515.

One of the fundamental purposes of sovereign immunity in American jurisprudence is to protect against unconsented suits for retrospective relief in the form of money damages payable from the public treasury. *See Edelman v. Jordan*, 415 U.S. 651 (1974) (suit prohibited under Eleventh Amendment immunity); *O'Neill v. State Highway Dep't*, 50 N.J. 307, 235 A.2d 1 (1967) (suit prohibited under common law immunity). Such relief is prohibited because it would deplete the public treasury as a means of compensating for past wrongs, it would mean a "monetary loss resulting from a past breach of a legal

duty." *Edelman v. Jordan*, 415 U.S. at 668. To the extent the State here seeks penalties and interest, that is doubly offensive to the principles of sovereign immunity. *Cf. Missouri Pac. R.R. v. Ault*, 256 U.S. 554 (1921); *United States v. New York Rayon Importing Co.*, 329 U.S. 654 (1947).

There has been no consent to suit against the Tribe in this case. Absent consent, there is nothing left for this Court to do but bar the State's claimed relief under *United States v. United States Fidelity & Guaranty Co., supra*. Significantly, the State points to no congressional authorization for its requested relief. Indeed, it cannot. Federal law and policy overwhelmingly suggest that an unconsented suit, particularly one which would raid a tribal treasury, is contrary to federal interests. "[A] principal goal of federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." The Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(4) (1988). Considerable federal legislation has been enacted to encourage Indian tribes to develop their resources and economies and thereby strengthen their governments. *See, e.g.*, the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721, the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1544; and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (*"Cabazon"*), this Court noted that the federal policy of Indian self-government includes the overriding goal of encouraging tribal self-sufficiency and economic development. *Cabazon*, 480 U.S. at 216. The Court held that "[t]hese are important federal interests. They were reaffirmed by the President's 1983 Statement

on Indian Policy." *Id.* at 217. The President declared that "[i]t is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." 19 Weekly Comp. Pres. Doc. 99 (1983), *cited in Cabazon*, 480 U.S. at 217 n.20.

It is well-documented that Indian tribes are economically poor. In 1974, Congress noted that "[a]ll the traditional indicators of economic levels place Indians and Indian reservations at the bottom of the scale. On every reservation today there is almost a total lack of an economic community." H.R. Rep. No. 93-907, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. Code Cong. & Admin. News 2873, 2874. Unlike states, most tribes cannot rely on taxation as a source of raising revenue, in part due to historical federal policies of allotment and cession which have drastically reduced their land base. Taxation and economic development are especially difficult for reservations that "contain no natural resources which can be exploited." *Cabazon*, 480 U.S. at 218.

Plainly, forcing tribes to expend their typically meager public monies for back taxes, penalties, and interest would hinder or cripple their ability to engage in economic development. It would also cut into or eliminate tribal governmental operations and essential services such as law enforcement, court systems, and social programs; services that, in light of reductions in the federal budget, tribes increasingly must themselves fund. "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Cabazon*, 480 U.S. at 219.

This Court should decline the invitation of the State to judicially abrogate tribal sovereign immunity and should hold that principles of tribal sovereignty as confirmed and recognized in federal law prohibit the State from collecting back taxes, penalties, and interest from an Indian tribe. *See Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 1521 (1989) (tribal sovereign immunity is governed by federal law); and *see generally* Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982) ("the federal policies of tribal self-determination, economic development, and cultural autonomy require that the tribal immunity doctrine be maintained"). Immunity from suit is one of the highest attributes of sovereignty. The state and federal governments have spent tens of decades gradually shaping their laws regarding sovereign immunity, *e.g.*, tort claims acts, caps on liability, statutes of limitations. Tribal laws should be allowed to evolve in the same way.

Indeed, this Court ought to afford tribes more protection in the area of sovereign immunity than it does states. States do not share the tenuous economic status of tribes. Moreover, states have representatives in Congress and tribes do not. With direct representation, states can protect themselves in ways that tribes cannot. Indeed, when Congress has seen fit to step in and regulate economic activities on Indian reservations in which both tribes and states have an interest, it has done so. *See* the Indian Gaming Regulatory Act of 1988, *supra*. The State's suggestion that the Court engage in such policy-making should be rejected.

B. Regarding Future Taxes, Assuming *Arguendo* Such Taxes Are Valid, The State Has Remedies For Prospective Relief If Tribes Should Fail To Collect Them.

If an Indian tribe is not assisting in collecting applicable state taxes on cigarette sales, a state has at least two means to address the problem prospectively. It may seize unstamped cigarettes off the reservation, or it may assess the wholesaler for the taxes.[6] The State here did not even attempt the first remedy and it made an apparent feeble attempt at the second. For the most part, it chose to sleep on its rights for several years. Now, without any legal authority and with unclean hands, the State asks this Court to fashion a new drastic remedy by judicially abrogating tribal sovereign immunity generally so that it may raid a tribal treasury for back taxes, penalties, and interest that accumulated during the time it inexplicably did largely nothing. Not only is this drastic remedy contrary to law, it is wholly unwarranted in light of existing remedies available to the State.

To enforce their tax laws, states may seize unstamped cigarettes off the reservation. This remedy was approved in *Colville*, where the Court found the state's interests sufficient to justify such seizures and that the seizures did not intrude on "core tribal interests." *Colville*, 447 U.S. at 161-62. Nothing in the record here suggests the State tried to seize cigarettes off the reservation. Nor has the State

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[6] Whether there is a third remedy in the form of a suit against tribal officials for prospective injunctive relief is an issue about which amici express no opinion, but do note that such recourse was not even attempted by the State.

shown that its assessment of the Tribe directly does not intrude on tribal interests. Clearly the State has ignored both the holding and the reasoning of *Colville* on this point.

The State could also, as the United States suggests, assess the wholesaler for the taxes, rather than the tribal retailer. Brief for the United States as Amicus Curiae at 18 n.17, *citing* Okla. Stat. Ann. 68, §§ 305(a) and (c). As the United States notes, the State is aware of this remedy because in the past it has assessed a wholesaler who supplied some cigarettes to this Tribe. *See City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (10th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 75 (1990).

The State hardly even tried to use its existing remedies. And it has failed to put forth any basis in law or reason why it is entitled to have this Court fashion a new remedy in this case. If existing remedies are insufficient, the State's answer lies with Congress. Congress can and has acted to waive tribal sovereign immunity when it sees fit to do so. *E.g.*, the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6903(13)(A), 6903(15), & 6972(a)(1)(A). *See also* the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2710(d)(7)(A)(ii) (federal district courts have jurisdiction over suits by tribes or states to enjoin class III gaming activity located on Indian lands and conducted in violation of tribal-state compact).

When Congress decides that tribal immunity from suit should bow to overriding federal policy, Congress knows how to waive such immunity. *See, e.g., Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (holding federal agencies and tribe liable under

RCRA to clean up solid waste disposal sites on reservation). There is, however, no congressional waiver of tribal immunity in the area of state taxes or for suits by states against tribes generally, and absent such a congressional statement, this Court has expressly held that it cannot imply one. *United States v. United States Fidelity & Guaranty Co., supra.*

II. THE STATE'S ARGUMENTS ABOUT THE CONTINUED EXISTENCE OF THE ORIGINAL BOUNDARIES OF THE RESERVATION ARE IRRELEVANT TO THIS CASE INVOLVING LAND HELD IN TRUST FOR THE TRIBE; MOREOVER, CONTRARY TO THE STATE'S CONTENTIONS, SUCH LAND IS SUBJECT TO TRIBAL JURISDICTION.

In Part II of this brief, amici will address the State's argument that the reservation boundaries have been disestablished, and will show why that argument is irrelevant as a matter of law to the issue raised in this case, that of jurisdiction over activities on tribal trust land. Amici will also address the issue of whether the tribal land involved in this case is subject to federal and tribal jurisdiction for the purposes of determining the issues presented herein, and will show that indeed the land is so subject to federal and tribal jurisdiction.

A. Under *Solem v. Bartlett* And Other Cases Of This Court, Disestablishment Is Irrelevant To Issues Of Jurisdiction Over Trust Land.

The State argues or implies that the boundaries of the Tribe's reservation have been disestablished. State's

Opening Brief at 10-11. Cases of this Court, however, hold that the issue of whether the boundaries of a reservation have been disestablished is relevant only to issues of jurisdiction over non-Indian fee land. Hence, the disestablishment issue is plainly irrelevant to this case which raises only issues of jurisdiction over activities on tribal trust land.

In *Solem v. Bartlett*, 465 U.S. 463 (1984) ("*Solem*"), the Court determined whether the boundaries of a reservation had been disestablished. But the reason that issue was pertinent was because the underlying issue was whether the state had jurisdiction over a portion of a reservation which had been opened to settlement by non-Indians by an act of Congress. Framing the narrow issue before it up front, the Court noted the distinction between the effect of reservation boundary disestablishment on non-Indian fee land and its effect on trust land.

> Regardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. In addition, opened lands that have been restored to reservation status by subsequent Acts of Congress fall within the exclusive criminal jurisdiction of federal and tribal courts.

Solem, 465 U.S. at 467 n.8 (citations omitted); *accord DeCoteau v. District County Court*, 420 U.S. 425, 427-28 (1975) ("*DeCoteau*").

Solem and *DeCoteau* plainly establish that issues of the existence of reservation boundaries are relevant only to issues of jurisdiction over activities on non-Indian fee lands, and are irrelevant to issues of jurisdiction over

trust lands, allotted and tribal. This rule has been repeatedly and unequivocally followed by the Tenth Circuit Court of Appeals and the Supreme Court of Oklahoma with respect to trust lands in Oklahoma. *See Indian Country, U.S.A., Inc. v. State of Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 975 n.3 (10th Cir. 1987), *cert. denied sub nom. Oklahoma Tax Comm'n v. Muscogee (Creek) Nation*, 487 U.S. 1218 (1988) (disestablishment question is relevant only to issues of jurisdiction over non-Indian lands; not tribal lands, trust lands, and allotments); *Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma*, 618 F.2d 665 (10th Cir. 1980) (issue of reservation boundary disestablishment irrelevant to jurisdiction over tribal trust lands and trust allotments); *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77, 82 (Okla. 1985) (trust allotments of tribe remain Indian country irrespective of reservation boundaries); *Ahboah v. Hous. Auth. of the Kiowa Tribe*, 660 P.2d 625 (Okla. 1983) (individual trust allotments are Indian country, whether within or without continuing reservation boundaries); *see also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3327 (U.S. Oct. 18, 1990) (No. 90-635) (allotted lands retain Indian country status for territorial jurisdiction purposes even if reservation boundaries have been disestablished).[7]

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[7] While many of these cases involved only trust allotments, that is simply because allotments happened to be the facts in those cases. As the United States points out, it would be perverse for the Court to find that a tribe had jurisdiction over land held in trust for its members, but did not have jurisdiction over land held for the tribe. Brief for the United States as Amicus Curiae at 26 n.20. Clearly, there is no principled reason for distinguishing tribal trust land from trust allotments in this situation.

This case raises only issues of jurisdiction over activities on tribal trust land. Hence, the question of the existence of reservation boundaries is irrelevant. Indeed, the land here has never been opened to settlement by non-Indians. *Compare Solem, supra,* 465 U.S. at 465. It has always been held either by the Tribe or the federal government. *See* State's Opening Brief at 11. Accordingly, this Court should disregard the State's argument to the extent the State is claiming that its jurisdiction over activities on the trust land is dependent on the existence or disestablishment of the reservation boundaries.[8]

B. Under A Long Line Of Cases Preceding And Including *United States v. John,* The Tribal Trust Land In This Case Is Territory Subject To The Tribe's Jurisdiction.

The State also argues or assumes that, even if the reservation boundaries have not been disestablished, the

[8] Alternatively, should this Court find that the existence of the reservation boundaries is relevant to this case, it should remand to the district court for a determination of that existence under its test articulated in Solem, 465 U.S. at 470. In Solem, recognizing the magnitude and importance of a finding of disestablishment, the Court cautioned against generalized, conclusory findings of disestablishment. *Id.* at 468-69. Rather, a finding of disestablishment requires a particularized inquiry of applicable acts of Congress, the historical circumstances surrounding the passage of those acts, and the subsequent treatment of the land by the federal government. The State's sweeping argument that the boundaries of Indian reservations in Oklahoma generally have been disestablished is flatly inconsistent with Solem and prior rulings of this Court in disestablishment cases.

land in this case is not subject to tribal jurisdiction for the purposes of resolving the issues presented herein. State's Opening Brief at 21-27. The land, however, is subject to the Tribe's jurisdiction because it has been validly set aside by Congress for the Tribe's use, and is held in trust for the Tribe by the federal government. This conclusion is mandated by decisions of this Court involving similar lands and congressional intent as manifested in federal statutes.

This Court has long held that lands "declared by Congress to be held in trust by the Federal Government" for the benefit of a tribe are subject to federal and tribal jurisdiction. *United States v. John,* 437 U.S. 634 (1978). There, the Court stated:

> The . . . lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision. There is no apparent reason why these lands, which had been purchased in previous years for the aid of those Indians, did not become a "reservation," at least for the purposes of federal criminal jurisdiction at that time.

437 U.S. at 649 (citations omitted). Precisely the same kind of lands as were involved in *United States v. John* are involved in this case. The land here was set aside by Congress and is held in trust for the Tribe. Act of Jan. 2, 1975, 88 Stat. 1922. *See also Mattz v. Arnett,* 412 U.S. 481 (1973) (undisposed-of ceded land restored to tribal ownership by Congress); *United States v. McGowan,* 302 U.S. 535 (1938) (lands purchased out of federal funds and occupied by tribe); *United States v. Pelican,* 232 U.S. 442

(1914) (allotted lands); *United States v. Sandoval*, 231 U.S. 28 (1913) (lands of Pueblo tribes held in fee); *Donnelly v. United States*, 228 U.S. 243 (1913) (executive order tribal lands); *Bates v. Clark*, 95 U.S. 204 (1877) (lands in original Indian title); and *see generally* F. Cohen, *Handbook on Federal Indian Law* 27-41 (1982 ed.) (hereinafter "Cohen").

In the Indian Country statute, 18 U.S.C. § 1151, Congress essentially adopted the test long adhered to by this Court: lands that are validly set aside for the Indians' use and are subject to federal protection are subject to federal and tribal jurisdiction. Accordingly, while Section 1151 is found in the federal criminal code, this Court has stated that the definition applies "to questions of both criminal and civil jurisdiction." *Cabazon, supra*, 480 U.S. at 207 n.5; *accord DeCoteau, supra*, 420 U.S. at 427 n.2. This rule has been widely followed by lower federal courts and state courts. *E.g., Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Comm'n, supra*, 829 F.2d at 973 (numerous cases confirm the principle that the Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands); *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1390 (9th Cir. 1988) (tribal taxing jurisdiction extends to Indian country as defined in 18 U.S.C. § 1151); *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma, supra*, 711 P.2d at 82 (definition of Indian country is relevant to questions of both criminal and civil jurisdiction).[9]

[9] Indeed, it would be anomalous for this Court to find that tribes do not have civil jurisdiction over territory which they

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Under this law and these principles, the land involved in this case is subject to tribal jurisdiction for the purpose of resolving the issues raised herein. This Court should affirm the holding of the Court of Appeals affirming the district court in this case on this point. The land is indisputably tribal trust land. Indeed, the State does not even argue that the land is not Indian country as defined in section 1151. Its narrow view of land subject to tribal jurisdiction simply runs counter to the long-time view of Congress and this Court. *E.g., United States v. John, supra.*

Essentially, the State's argument about the land in this case hinges on its theory that Indian tribes in Oklahoma and their lands generally are somehow "different" than tribes and tribal territory elsewhere. The State's primary "authority" on this point is paper generated by the Dawes Commission in allotting Oklahoma Indian lands in the 1890's. It is true that reservations in Oklahoma were subject to the federal allotment policy of the late nineteenth century. But so were reservations elsewhere, and the policy of allotment has long since been repudiated by Congress. *Moe, supra*, 425 U.S. at 478-79. Furthermore, the State's attempt to rely upon the intermingling of Indians and non-Indians on reservations, which, as a practical matter resulted from the allotment

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obviously have criminal jurisdiction over under section 1151. Decisions of this Court such as Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) and Duro v. Reina, ___ U.S. ___, 110 S.Ct. 2053 (1990) hold that tribal criminal jurisdiction is more limited than tribal civil jurisdiction. Under that theory, if tribes have territorial jurisdiction for criminal purposes, *a fortiori* they have it for civil purposes.

policy, as grounds for contending that the Tribe lost jurisdiction over its tribal trust lands was soundly rejected by this Court in *Moe, id.* at 476; *see also* Cohen, *supra*, at 231.

Indeed, this Court has historically treated tribes in Oklahoma the same as tribes elsewhere. Both *United States v. United States Fidelity & Guaranty Co., supra*, and *Turner v. United States, supra*, the cases in which this Court upheld tribal sovereign immunity, involved Oklahoma tribes. This Court recently applied normal rules of Indian law and other federal law doctrines to an Oklahoma tribe in *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987). Clearly, the dictum in the one case upon which the State relies, *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), is inapposite. That case involved the application of federal and state law to the personal property of Indian individuals, not the trust property of Indian tribes.

Moreover, the State's argument cannot withstand the voluminous evidence that the federal government today treats Oklahoma tribes and their territory the same as it treats tribes and their lands elsewhere. In virtually every area in which it administers its trust responsibilities, Congress affords Oklahoma tribes the same protection and services as it does other tribes. *See, e.g.*, 7 U.S.C. § 1985(e)(1)(D)(ii) (agricultural credit and loans); 25 U.S.C. § 2022b(b)(3) (educational grants and programs); 29 U.S.C. § 750(c) (handicapped vocational rehabilitation services); 42 U.S.C. § 682(i)(6) (job opportunities and basic skills training programs); 42 U.S.C. § 5318(n)(2) (urban development grants); *see also* citations to other similar statutes in the Brief for the United States as

Amicus Curiae in this case at 25-26 & n.19.[10] In fact, the federal government has publicly advocated its view that the Tribe here is entitled to the same governmental and territorial protection to which tribes elsewhere are entitled. *See* Brief for the United States as Amicus Curiae in this case.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed regarding its holdings that the Tribe is immune from suit, and that the trust land is subject to tribal jurisdiction.

Respectfully submitted,

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[10] The references in some of these statutes to "former Indian reservations in Oklahoma" is plainly intended to define the outer boundaries of federal service areas as coinciding with the original boundaries of the reservations, notwithstanding that some reservations may have been judicially determined to be diminished. Such references evince the continued significance of these boundaries for important federal purposes.